

May 5, 2008

Mr. Chris Stefanadis
15 N. Cummings Drive
Middletown, DE 19709

**RE: Freedom of Information Act Complaint Against
Town of Middletown**

Dear Mr. Stefanadis:

On March 10 and 11, 2008 the Delaware Department of Justice (DDOJ) received your correspondence alleging that the Town of Middletown (the "Town") violated the Freedom of Information Act (FOIA) regarding the Middletown Action Network (MAN) and amendments to the Town charter. On March 12, 2008 we sent that complaint to the Town and received their response on March 24, 2008. We then made several requests to the Town for more information, the last of which was responded to on April 15, 2008.

We understand you to have made the following allegations:

- That although the members of MAN were listed in the ordinance creating MAN, the Mayor appointed two additional members;
- That between September 7, 2007 and January 7, 2008 there were non-public meetings of MAN, at which the MAN by-laws were drafted. One meeting was attended by the Mayor and two Council members;
- That those MAN meetings did not have minutes or an agenda;

- That at the January 7, 2008 meeting, the Mayor and Council approved proposed amendments to the Town's Charter to submit to the General Assembly for approval, although there had been no public notice of the matter;
- That amendments to the Charter were formulated without public notice;
- That the vote on the amendments to the Charter violated 22 *Del. C.*, ch. 8, subch.

II. As to this allegation, the Attorney General lacks the authority to enforce those provisions of title 22. Therefore we will not address that allegation here.

Relevant Facts

The Middletown Action Network. According to your correspondence, MAN members made a presentation to the August 6, 2007 Council meeting, stating, according to the minutes of that meeting, "their strategic plan is to provide early anti-drug intervention, policing, drug treatment, mental health services, education, housing and employment in a professional and confidential manner. MAN is a collaboration between police agencies, educational institutions, social service agencies and the Town of Middletown. Their purpose is to help all Middletown citizens improve their quality of life and the quality of their communities. ... [T]hey will be a recommending body only."

Introduction of an ordinance to create the MAN Commission was on the agenda for the Council meeting of September 10, 2007, and such an ordinance, stating the MAN Commission "shall become effective upon passage of this ordinance," was adopted on October 1, 2007. That ordinance also named the Commission members: John Brown,

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Brian Lewis, Forice Lively, Roosevelt Nichols and Marvin Perkins. According to the Town, Kristen Krenzer and Tim DeSheppler were volunteer participants.

The MAN bylaws were ratified by the Council on January 7, 2008. They provide in Part Two, Article I, that the Commission's purposes include, among other items, "1. [to] [i]mprove the quality of life for Middletown residents through providing information regarding education, housing, employment, mental health, drug treatment, policing, early intervention or other life issues." You have noted that while MAN's stated purpose on August 6, 2007 was "to provide early anti-drug intervention," etc., on January 7, 2008 the bylaws as ratified stated that MAN's purpose is to "provid[e] information."

The Town has acknowledged that from October 1, 2007 to January 7, 2008 MAN met "two to three times." While the Town asserts that until January 7, when the MAN bylaws were adopted, MAN was neither a public body nor subject to FOIA, it does not dispute that the MAN meetings that occurred between October and January were for the purpose of formulating bylaws, as you alleged.

Amendments to the Town of Middletown Charter. The posted agenda for the January 7, 2008 Council meeting included amendment of the Town Charter: "10. Public Hearing – Adopt a Resolution to amend the Charter for the Town of Middletown." According to <http://charters.delaware.gov/middletown.shtml>, the current Charter for Middletown contains a debt limit of \$4 million. The proposed revised Charter includes provisions that remove the debt limit of \$4 million. You allege that at the January

meeting the Mayor failed to include the debt limit in his summary of the revisions subject to vote. You also allege that the Mayor stated at the February meeting that the Town had been preparing the Charter revisions for months, but that you had not found any reference to that topic in any of the Town Council's agenda or minutes.

Relevant Statutes

"Every meeting of all public bodies shall be open to the public...." 29 *Del. C.* § 10004(a). A meeting is "the formal or informal gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." 29 *Del. C.* § 10002(b). 29 *Del. C.* § 10002(c) defines "public body" as including "any ... commission ... which: . . . (3) is impliedly or specifically charged by any other public official, body or agency to advise or make reports, investigations or recommendations." "Public business" is "any matter over which the public body has supervision, control, jurisdiction or advisory power." 29 *Del. C.* § 10002(e).

29 *Del. C.* § 10004(e)(2) requires public bodies to provide the public seven days' notice of the time, place and agenda for their regular meetings. The agenda is defined as a "general statement of the major issues expected to be discussed at a public meeting[.]" 29 *Del. C.* § 10002(a). Public bodies must "maintain minutes of all meetings[.]" 29 *Del. C.* § 10004(f).

Discussion

The Middletown Action Network. As to your allegation that Kristen Krenzer and Tim DeSheppler were appointed to MAN by the Mayor, there is no evidence they

were appointed to the Commission. Even if the Mayor had appointed them, doing so would not be a FOIA violation. FOIA requires only that meetings of a quorum of a public body be open to the public. The Mayor is not required to hold a public meeting in order to take an executive action.

However, the several MAN meetings that occurred between October 1, 2007 and January 7, 2008 were meetings of a public body to which FOIA applied. While the Town contends that MAN did not become a public body until its bylaws were adopted on January 7, 2008, it cites no legal authority for that position. On the other hand, the statutory definition of a public body includes “any commission ... impliedly or specifically charged by any other ... public body ... to advise or make reports, investigation or recommendations,” 29 *Del. C.* § 10002(c), and the October 1, 2007 ordinance creating MAN stated that the Commission “shall become effective upon passage of this ordinance.” Therefore, MAN became a public body on October 1, 2007. As such, any meetings of a quorum of MAN members that occurred after October 1, 2007, were subject to FOIA’s requirements not only that meetings be public, but also that the meetings be noticed to the public by the posting of an agenda and that minutes be maintained. However, the fact that the Mayor and two councilmen may have attended a MAN meeting does not make the MAN meeting a meeting of the Town. The violations are those of MAN, not the Town.

The question is what steps should be taken to remedy the violation. The Town has suggested that any FOIA violation regarding the adoption of the MAN bylaws was remedied when the Town Council voted to approve the bylaws at the Council meeting of January 7, 2008. It does not appear from the minutes of the January 7 meeting that the bylaws were discussed or debated. The purpose of the FOIA open meeting requirements is for the public to have the opportunity to observe debate—hence the definition of “meeting” includes even informal gatherings where public business is discussed, as well as acted on. 29 *Del. C.* § 10002(b). To allow public bodies to hold private meetings at which policy is discussed and decisions are reached, and then have only the vote at a public meeting would obviate FOIA. *See Att’y. Gen. Op.* 06-ID26 (December 20, 2006), 2006 WL 4130484 (Del. A.G.). Therefore, we direct that MAN put on the next agenda a presentation of its bylaws, including explanation as to why changes were made and how the bylaws evolved.

The Charter Amendments. The first issue under FOIA with regard to the Charter Amendments is whether the public had sufficient notice regarding the resolution to amend the Town Charter. FOIA does not require the agenda to contain a detailed explanation of the substance of the matters posted, but only a “general statement” sufficient to put the public on notice of “the fact that [a] specific important subject will be treated.” *Ianni v. Dep’t. of Elections of New Castle Co.*, 1986 WL 9610, *5 (Del. Ch.). Had the agenda in question only said “Town Charter,” it would have violated the rule

established in *Ianni*. Had it specifically listed only some of the subjects covered by the Charter amendment resolutions, the agenda would have been incomplete, in violation of FOIA. But the Town chose a middle ground, announcing that a resolution to amend the Charter would be voted on, thereby putting the public on sufficient notice that an “important subject will be treated.”

The content of the Mayor’s comments made at the public meeting is inapposite. FOIA does not concern itself with the content of a public meeting, unless the meeting fails to conform to the posted agenda. So long as the public notice was sufficient (and it was in this case), the Mayor’s remarks are not a FOIA issue.

The final question concerning the Charter amendments is whether they were discussed privately by a quorum of the Mayor and Council before they were voted on at the public meeting in January. The Town denies that any such discussions occurred, and there is no evidence that they did. The Town plausibly asserts that the Charter amendments were drafted by the Mayor and his staff, not by the Council. Mere speculation by a citizen does not put the Town in the position of having to prove a negative. *Atty. Gen. Op.* 05-IB10 (April 11, 2005).

Conclusion

For the reasons stated herein, it is determined:

- the Mayor of the Town of Middletown did not violate FOIA even if he did appoint two members to the Middletown Action Network;

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- the presence of the Mayor and two Council members at a MAN meeting did not violate FOIA;
- the Middletown Action Network violated FOIA by holding closed meetings of a quorum of the members without public notice of the time, place and agenda of the meetings, and without maintaining minutes of the meetings;
- inclusion on the agenda of the general topic of a resolution to recommend Charter amendments did not violate FOIA;
- there were no non-public meetings of a quorum of the Mayor and Council concerning the Charter amendments in violation of FOIA.

We direct the Middletown Action Network to put a presentation of the process by which its bylaws were developed on its next public agenda. The Town Solicitor will report back to this office in writing within ten days after remediation is completed.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

Lawrence W. Lewis
State Solicitor

cc: Scott E. Chambers, Esquire